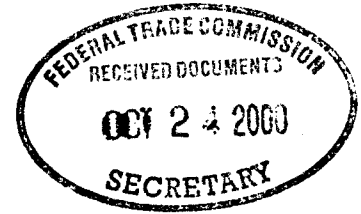


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
 )  
 )  
HOECHST MARION ROUSSEL, INC., )  
 a corporation, )  
 )  
CARDERM CAPITAL L.P., )  
 a limited partnership, )  
 )  
and )  
 )  
ANDRX CORPORATION, )  
 a corporation. )  
\_\_\_\_\_ )

Docket No. 9293

TO: The Honorable D. Michael Chappell  
Administrative Law Judge

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT ANDRX'S  
MOTION TO COMPEL EUGENE N. MELNYK AND BRUCE BRYDON  
TO APPEAR FOR DEPOSITIONS OR, IN THE ALTERNATIVE,  
TO PRECLUDE BIOVAIL WITNESSES FROM APPEARING AT TRIAL**

Andrx Corporation moves for sanctions on complaint counsel because of discovery disputes between Andrx and two nonparties, one of whom is not even listed as a witness in this matter. Whatever the resolution of the dispute between Andrx and Biovail employees Eugene Melnyk and Bruce Brydon – and complaint counsel take no position on that dispute – sanctioning complaint counsel would be unjust and contrary to the Commission's rules and precedent.

The imposition of discovery sanctions in this proceeding is governed by Commission Rule 3.38, 16 C.F.R. § 3.38. Rule 3.38 states that, "[i]f a party or an officer or agent of a party fails to comply with a subpoena . . . the Administrative Law Judge . . . may take such action in regard thereto as is just." Rule 3.38(b), 16 C.F.R. § 3.38(b). According to the Commission,

“[t]he language of Rule 3.38 makes clear that sanctions may be imposed only upon a party, or an officer or agent of a party.” *Grand Union Co.*, 102 F.T.C. 812, 1089 (1983). The proper remedy for a nonparty’s refusal to comply with a subpoena is not a sanction on a party, but rather court enforcement of the subpoena. *See Order Denying Aventis’ Motion to Enforce Compliance with the Subpoena Served on Sitrick*, at 2 (Oct. 23, 2000). *See also* 16 C.F.R. § 3.38(c); 15 U.S.C. § 49.

Despite this clear precedent,<sup>1</sup> Andrx seeks to impose sanctions on complaint counsel because of discovery disputes between Andrx and nonparties. One of these nonparties, Mr. Melnyk, is not even listed as a witness by complaint counsel. Andrx makes the factually unsupported – and unsupportable – assertion that the nonparties are complaint counsel’s agents in this matter, and therefore subject complaint counsel to sanctions. The Commission’s decision in *Grand Union* is instructive on this point. Noting that “[i]n most cases a witness is not an agent or officer of a party,” the Commission held that even discovery abuses by an expert witness – a witness who is expected to work most closely with associated counsel – cannot be attributed to complaint counsel under Rule 3.38. *See Grand Union*, 102 F.T.C. at 1089. All the more so, complaint counsel should not be sanctioned under Rule 3.38 for any discovery misconduct by nonparty fact witnesses in this case.

Even if complaint counsel could somehow be held responsible for Andrx’s discovery

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<sup>1</sup> The cases Andrx cites – arising in a different legal context, without an explicit provision regarding nonparties – are therefore not persuasive. In any event, the cases are distinguished on their facts. One case involves a former employee of the sanctioned party and a prior order explicitly threatening preclusion. *See Bradgate Assoc., Inc. v. Fellows, Read & Assoc.*, Civ. No. 90-2370 (CSF), 1992 WL 88122 (D.N.J. 1992). The other involves the sanctioned-party’s expert witness, who failed to comply with discovery at the direction of the sanctioned party. *See Magee v. Paul Revere Life Ins. Co.*, 178 F.R.D. 33 (E.D.N.Y. 1998).

disputes, preclusion of witness testimony is wholly inappropriate. Rule 3.38 states that any sanction must be just. *See* 16 C.F.R. § 3.38(b). The fairness of Andrx's requested remedy must be judged in light of the following facts:

- Andrx has already taken the deposition of Biovail's general counsel, Kenneth Cancellera.
- Mr. Melnyk is not even listed as a complaint counsel witness.<sup>2</sup>
- Mr. Brydon already made himself available to Andrx for a deposition in this case.<sup>3</sup>
- Andrx has the transcripts of Mr. Melnyk's and Mr. Brydon's depositions, taken in the litigation between Biovail and respondent Hoechst over the Stipulation and Agreement that is at issue in the current proceeding.

Andrx has had the opportunity in this proceeding to depose the Biovail witnesses scheduled to appear in this case and in any event already has relevant testimony from all these witnesses.

Under these circumstances, preclusion of any Biovail witness would be patently unjust.

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<sup>2</sup> Andrx's suggestion that there was something improper about Mr. Melnyk appearing on complaint counsel's preliminary witness list but not on its final witness list ignores this Court's scheduling orders, which require preliminary, revised, and final witness lists. *See, e.g.*, Scheduling Order at 1-2 (April 26, 2000).

<sup>3</sup> The only reason Andrx still needs to take Mr. Brydon's deposition is because Andrx mistakenly failed to provide a court reporter for the deposition they scheduled.

For the reasons discussed above, Andrx's motion to preclude testimony offered by complaint counsel should be denied.

Respectfully Submitted,

Handwritten signature in cursive script, appearing to read "Jon M. Steiger" and "Markus H. Meier".

Markus H. Meier  
Jon M. Steiger

Counsel Supporting the Complaint

Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580

Dated: October 24, 2000

## CERTIFICATE OF SERVICE

I, Jon Miller Steiger, hereby certify that on October 24, 2000, I caused a copy of complaint counsel's opposition to Andrx Corporation's Motion to Compel Eugene N. Melnyk and Bruce Brydon to Appear for Depositions or, in the alternative, to Preclude Biovail Witnesses from Appearing at Trial to be served upon the following persons via hand delivery or facsimile and overnight delivery.

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